the failure to call any witnesses. I do not think that there is any doubt in this proposition or in the other proposition posed in the third question, which is in so similar terms as the second question that I can see no valid difference between them. As I have said the question posed goes to the elementary principles of similar trials. The answers to these fundamental questions are so straight-forward and simple that I do not see any useful purpose in referring them for the weighty decision of the Federal Court.

The purpose of this application is, of course, to obtain the re-hearing of an appeal that was dismissed and that would have ended at the High Court, unless the High Court judge can be persuaded that a principle of law is involved which requires the determination of the Federal Court.

Now this case was a case of a pirate taxi. At the trial all the passengers found in the car when it was detained were offered by the prosecution to the defence as witnesses. The defence called all but one of these passengers. The passengers who were called by the defence all testified that they had not paid nor had intended to pay any fare. One passenger was not called and it is in respect of this one passenger that all these so-called questions were posed. It would appear to be suggested that the dismissal of the appeal was as a consequence of the adverse inference drawn from not calling this witness. However, if my memory serves me right, at the hearing of the appeal I invited counsel for the appellant to address me on the operation and meaning of section 144(b) of the Road Traffic Ordinance which reads:—

"that the passengers carried in a motor vehicle were being carried in consideration of separate payments made by them;".

Mr. Chan has, if I recall, dealt with this presumption in another appeal. It is for this reason as I understand that he could not find anything useful to urge on me. It will therefore be seen that this case was not the ordinary case where the burden lies at all times on the prosecution to prove the guilt of the accused. It is a case dealing with a presumption of law. Here the presumption is that each passenger is presumed to make a separate payment. If this is so, then if any car was carrying five passengers and four gave evidence that they were not passengers in a taxi, had not paid or intended to pay any fare in such a way that they were accepted as witnesses of truth by the magistrate, there remained the status of the fifth passenger. The presumption still arises in respect of the fifth passenger and, if the fifth passenger is not called to give evidence to rebut the prosecution and to prove the contrary on a balance of probabilities, then the presumption means that he is a fare-paying passenger and the driver of the taxi must stand convicted on the pirate taxi charge, since he has carried one passenger for hire or reward.

As I said before, I invited the then counsel for the appellant to address me on this presumption. No address was made. I cannot help feeling that if an effort was made to understand or to try to understand the decision of the Bench, this application would have been unnecessary. To say the least, the questions posed lacked that honesty that I think the Bench is entitled to receive or to expect.

This application is dismissed.

Application dismissed.

Solicitors: *Cheang Lee & Ong.*

WONG SEE KUI v. HONG HIN TIN MINING CO.

[OCJ. Raja Azlan Shah J.) July 11, 1969]
[Kuala Lumpur — Civil Suit No. 620 of 1967]

Tort — Trespass — Nuisance — Negligence — Proof of damage — Claim to concurrent possession — Deposit of tailings into fishpond held by plaintiff under T.O.L.

Mining — Tailings from mine — Dumping of — Licenced by authority — Whether liable to trespass.

The plaintiff held a temporary occupation licence in respect of a pond for use as a fishpond. The defendant company obtained a licence for mining operations on certain nearby land and one of the conditions of the licence was that tailings from the land should be deposited on the land in which the plaintiff's pond was. The defendant company started to dump into the plaintiff's pond and the plaintiff thereupon brought an action for trespass, nuisance and negligence. No evidence was brought by the plaintiff to show the damage caused by the dumping.

Held: (1) as the plaintiff had not shown that he had suffered damage from the acts of the defendant company, the claims for nuisance and for negligence must fail;

(2) as the defendant company had a licence from the Mines Department to dump their tailings into the pond, their acts of dumpings were equivelant to acts of concurrent possession and they were not therefore liable for trespass.

[*Editorial Note:* Reference may be made to the Federal Court decision in *Guan Soon Tin Mining Co.* v. *Wong Foon Kum* [1969] 1 M.L.J. 99].

Cases referred to:—

(1) *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880.

(2) *Munday Ltd.* v. *London County Council* [1916] 2 K.B. 331.

(3) *East Suffolk Rivers Catchment Board* v. *Kent* [1940] 4 All E.R. 527 at p. 532.

(4) *Nicholls* v. *Ely Beet Sugar Factory Ltd.* [1936] Ch. 343.

(5) *Mahamed Said* v. *Fatimah* [1962] M.L.J. 328.

(6) *Julaika Bivi* v. *Mydin* [1961] M.L.J. 310.

(7) *Lord Fitzhardinge* v. *Purcell* [1908] 2 Ch. 145.

(8) *Fowley Marine (Emsworth) Ltd.* v. *Gafford* [1968] 1 All E.R. 979, 986.

(9) *The Raub Australian Gold Mines Ltd.* v. *E. Rostados & A.N. Dumaresq* (1920), 2 F.M.S.L.R. 216.

CIVIL SUIT.

V. Oorjitham for the plaintiff.

Ronald Khoo for the defendants.

Cur. Adv. Vult.

Raja Azlan Shah J.: The plaintiff, Wong See Kui, held a temporary occupation licence (hereinafter referred to as a T.O.L.) in respect of a pond situate on lot 3442, Mukim of Rawang, Selangor for use as a fish pond. The T.O.L. No. 518047 was first granted in 1961 and had been renewed annually. It was valid on the date of the present action and was to expire on 31st December 1967. There was an outlet from the pond into Sungei Rawang.

On 18th March 1967, the senior inspector of mines, Selangor, issued a licence to the defendant company, Hong Hing Tin Mining Company, for mining operations in nearby land, namely lots 3517 and 4791, Mukim of Rawang, Selangor (Licence No. 59/67). This licence was effective from 6th February 1967 to 12th December 1967. The licence stated: "That all tailings be deposited on the land described in Schedule 'B', vide attached plan" which was lot 3442. Accordingly, the defendant company constructed a pipe connecting their mine to plaintiff's pond for the discharge of tailings, slime, dregs and water.

From 12th February 1967, the defendant company started to dump into plaintiff's pond. On the next day, 13th February 1967, plaintiff wrote a complaint to the defendant company and warned them to stop the dumping. A copy of this letter was sent to the Collector of Land Revenue, Ulu Selangor, Kuala Kubu Bharu. On 17th February 1967 plaintiff's solicitors wrote to the manager of the defendant company requesting that they immediately cease the unlawful dumping. On 24th February 1967, defendant company's solicitors replied that the defendant company would not comply with plaintiff's request since the use of the pond as tailings area had been approved by the mines department. On 7th April, 1967 the mines department wrote to the plaintiff's solicitors confirming that a licence had been granted to the defendant company to carry out mining and to make use of the pond for dumping.

Plaintiff then brought this action for trespass and nuisance. In the course of the hearing, plaintiff also submitted a claim on negligence. Plaintiff claimed damages and an injunction.

It is plaintiff's case that the dumping by the defendant company caused him damage. He claimed that the tailings, slime, dregs and water which defendant company discharged into his pond (i) killed the fish which he was rearing therein (ii) caused an overflow of water in the pond which resulted in further loss of fish and (iii) damaged the support surrounding his pond.

Plaintiff claims that during the period January 1966 to May 1966, he introduced 12,000 fish into the pond at a cost of $4,100. Plaintiff produced three bills Nos. 2377, 3396 and 5199 from the Keow Kee Fish Merchants, Jinjang South, Kuala Lumpur, dated 29th January 1966, 9th March 1966 and 13th May 1966 respectively for the supply of fish to the value of $1,300, $2,000 and $800 respectively. These fish were to be harvested in a year's time. Plaintiff says that he had not at any time harvested the fish as they were not large enough.

An expert on fisheries, Mr. A.A. Jothy, from the Fisheries Research Institute, Penang described the effect of tailings on fish as follows:—

> "As soon as the tailings are dumped in the pool they tend to make the water turbid. This can bring about discomfort to the fish, eventually resulting in mortality mainly because of two reasons: (1) slit from the dredge tends to clog the respiratory mechanism of the fish and they die from suffocation; (2) there will be depletion in the dissolved oxygen content of the water, also giving rise to suffocation.
>
> As tailings come in at one end of the pool, the natural reaction on the part of the fish would be to move to the opposite end of the pool or towards any outlets through which they would escape. If there are no outlets, the fish will eventually be trapped by the silt, suffer mortality, and within a matter of about three days sink to the bottom. During the period of the three days they can be observed to struggle on the water surface, gasping for air, and after they sink to the bottom decomposition begins to take place, the abdominal cavity bloats up and the fish surfaces."

This, then, is what could happen to the fish on the introduction of tailings. In the present case, no one saw any struggling or dead fish in the pond. From February 1967 to March 1967, the manager of the defendant company visited the pond four or five times a week and he did not see any dead fish in the pond. The plaintiff himself did not see any. None was found. It is unusual that no one saw any dead fish though it is claimed the some 12,000 had been introduced. True, there might be a tendency for the fish to escape through the outlet to Sungei Rawang. But this is merely hypothetical. No proof was given that fish did escape from the pond by way of the outlet or

that dead fish were washed away through the outlet — though this possibly could happen. There are serious doubts as to whether any fish was in fact introduced into the pond.

Even assuming that fish were in fact introduced into the pond, the plaintiff had failed to prove that the dumping of tailings by the defendant company did in fact kill the fish. Mr. Jothy's evidence is theoretical — it must be supported by evidence that what Mr. Jothy described did occur in the present case. No test of any kind was taken of the water in the pond in spite of the fact that to the date of the present action, the defendant company was still dumping into the pond. And no dead fish was sent for examination to ascertain the actual cause of death — in fact none was found.

The plaintiff next claims that the dumping caused an overflow which resulted in further loss of fish. To fortify his point he produced some photographs showing the surplus water escaping from the fish pond to Sungei Rawang through the outlet. But this is inadequate evidence. The issue is whether any fish did in fact escape from the fish pond because of the overflow. The fact of an overflow does not prove that fish did in fact escape — though this could possibly happen.

Finally, the plaintiff claims that the support surrounding the pond was damaged. He says that he had put a wire mesh across the poles at the outlet of the pond to Sungei Rawang to prevent fish escaping into the river. He produced some photographs showing some poles across the outlet at a distance of a few feet apart. But there is no evidence that there was any wire mesh across them. He alleges that the defendant company had removed the wire mesh, but he did not see that happen nor did he adduce any evidence to prove that.

Therefore, the plaintiff has not discharged his burden of proof on the question of damage caused to him by the defendant company. The test is one of balance of probabilities, not the existence of possibilities.

Since damage is one of the essentials of nuisance, (see *Sedleigh-Denfield v. O'Callaghan*)[1] and negligence, (see *Munday Ltd. v. London County Council*),[2] the plaintiff's case founded on these two causes of action must fail. In *Sedleigh-Denfield's* case Lord Atkin said at page 896:—

> "It is probably strictly correct to say that so long as the offending condition is confined to the defendant's own land without causing damage it is not a nuisance, though it may threaten to become a nuisance. But where damage has accrued the nuisance has been caused."

In *Munday's* case Lord Reading, C.J. said at p. 334:—

> "Negligence alone does not give a cause of action, damages alone does not give a cause of action; the two must co-exist."

See also *East Suffolk Rivers Catchment Board v. Kent.*[3]

The case of *Nicholls v. Ely Beet Sugar Factory Ltd.*[4] is of no assistance to the plaintiff. In *Nicholl's* case, the plaintiff was the owner of two several and exclusive fisheries in a river. Defendants were manufacturers of beet-sugar with a factory some miles above the plaintiff's fisheries. The plaintiff alleged that the defendants discharged into the river large quantities of refuse and effluent whereby he suffered damage. Though the plaintiff failed to prove that the injury to his fisheries had been caused by the acts of defendants, the Court of Appeal held that he was entitled to succeed on the broad principle that the invasion of a legal right carried along the right to damage without proof of pecuniary loss. But *Nicholl's* case can be distinguished on the ground that the plaintiff in that case was the owner of the several fishery in gross not appendant or appurtenant to land, the nature of his right being a profit a prendre. We are not concerned with the infringement of a profit a prendre in the present case. It may be so that in the case of a nuisance to a profit a prendre, no damage need be proved. *Nicholl's* case is authority only for that proposition and not that damage need not be proved in all actions for nuisance.

I now come to the question of trespass. On principle and authority, the plaintiff is entitled to exclusive possession, that is as exclusive as the nature of the *locus in quo* would permit to maintain a case of trespass: see *Mohamed Said v. Fatimah:*[5] *Julaika Bivi v. Mydin.*[6] Trespass consists in the intentional intrusion of another's land. It is committed not only by intrusion in person but also by propelling objects on to another's land. The defendant company by intentionally discharging into the plaintiff's pond has committed trespass and every continuance of a trespass is a fresh trespass. *Prima facie* the plaintiff is entitled to succeed though there was no proof of actual damage suffered since trespass is actionable *per se.*

For the defendant company it is said that they had a licence from the mines department to dump their tailings into the same pond. Putting in a compendious form they regard their acts of dumping the tailings into the same pond as "equivalent acts of concurrent possession." They contended that this area whether it is described as T.O.L. land or mining land, belongs to one and the same owner i.e., the Ruler of the State in whom all land in the State vests, and they are claiming under the title of the Ruler.

The point is novel. The law on such matters can be restated without any difficulty. It is well established that as against a person in possession a stranger cannot defend himself by showing that there was title in some third person unless he himself claims under it. In the words of Parker J. in *Lord Fitzhardinge v. Purcell*[7]:—

"An action of trespass is found on possession, and in order to succeed the plaintiff must show possession of the lands on which the acts complained of were committed at the date of such acts. If possession be shown, the defendant is not at liberty to set up the title of a third party unless he justifies what he has done under a licence from such third party."

For a recent exposition of the same matter, see the observation of Willmer L.J. in *Fowley Marine (Emsworth) Ltd. v. Gafford.*[8]

It only becomes necessary to examine the facts relied on by the defendant company in order to see whether they can fairly be described as "equivalent acts of concurrent possession."

The Temporary Occupation Licence was first issued to the plaintiff in 1961 when the F.M.S. Land Code (Cap. 138) was operative. Section 17 of that Code provided:—

"The Ruler in Council may permit (a) temporary occupation of State land under licence."

That Code had since been replaced by the National Land Code, 1965 which is now the operative law. Section 65(1) of the National Land Code provides:—

"The State Authority may in accordance with the provisions of this Chapter and of any rules under section 14, permit the temporary occupation under licence of — (a) State land."

The licence of the defendant company was issued in 1967 under section 91(i) of the Mining Enactment (Cap. 147). It provides:—

"The warden may grant to any person a licence, for a period not exceeding twelve months and subject to such conditions, as shall be therein stated, to work mining land by any of such means as are in section 90 mentioned."

Section 82(i) of the Enactment provides:—

"An inspector may direct any occupier of mining land to deposit his tailings or overburden on any State or mining land."

The dumping area in this case was stated in defendant company's licence to be lot 3442.

Under departmental arrangement, the mines department would normally inform the land office when they wished to retain land for dumping and the land office would contact the mines department before issuing a Temporary Occupation Licence. In 1968 the mines department had informed the Land Office at Kuala Kubu Bharu that they wished to use Lot 3442 for dumping purposes and there was no record of any objection by the land office. But the land office did not contact the mines department when they issued a Temporary Occupation Licence to the plaintiff in 1961 in respect of lot 3442.

The departmental arrangement is for convenience and does not affect the rights and liabilities of the parties to the dispute.

The inference which I should be inclined to draw is that any person in the position of the defendant company who were licenced to dump tailings into the same pond did so with an *animus possidendi.* Their acts were consistent with the acts of any occupying owner who might be expected to deal with it. The test propounded in a passage from *Pollock and Wright* on Possession in the Common Law. p. 30 is germane:—

"What kind of acts and how many, can be accepted as proof of exclusive use, must depend to a great extent on the manner in which the particular kind of property is commonly used. When the object is as a whole incapable of manual control, and the question is merely who has *de facto* possession, all that a claimant can do is to show that he or someone through whom he claims has been dealing with that object as an occupying owner might be expected to deal with it, and that no one else has done so."

In my opinion I regard the defendant company's acts as "equivalent" to those of the plaintiff; I think that they were acts of possession. It would be wrong in the circumstances to allow the plaintiff to found a claim in trespass in view of the mining licence granted to the defendant company. The defendant company's contention must therefore prevail.

The only cause open to the plaintiff in the circumstances is an action for damages under the Mining Enactment, that is, a claim for breach of a statutory provision i.e., section 134. which provides:—

"No title, licence or other authority issued under this Enactment shall exempt any person from liability in respect of any damage occasioned by such person to the property of the Government or of any person."

In this connection the case of *The Raub Australian Gold Mines Ltd. v. E. Rostados and A.N. Dumaresq*[9] might be of assistance to the plaintiff. But I fail to see how he can succeed in view of my finding that damage has not been proved. In any event such claim is not justified by the pleadings.

For the above reasons I would dismiss the plaintiff's case. I do not think this is a proper case where I should award costs against the unsuccessful plaintiff.

Action dismissed.

Solicitors: *Oorjitham & Lam; Shearn, Delamore & Co.*